THE JOURNAL
OF
POLITICAL ECONOMY

VOLUME 30 *April 1922* NUMBER 2

SUCCESSION DUTIES IN CANADIAN PROVINCES

A knowledge of the character and construction of British legislation in the taxation of estates and successions is essential to an understanding of the Succession Duties of the various Canadian Provinces.

Of the death duties in the United Kingdom the probate is the oldest. For practical purposes it was abolished by the Finance Act in 1894, but the principles of its incidence apply to the estate duty. As administered by the early ecclesiastical courts it was imposed upon only so much property of the deceased as was locally situated within the jurisdiction of the court. For the court to declare property liable to probate was to affirm that it was locally situate in its area of jurisdiction. For example, the courts held that shares in a canal company should be probated in the diocese where the transfer office was located;[1] that foreign personal property of a person dying domiciled in England was not liable to probate duty;[2] that duty paid in England on shares of a railway situate in Scotland with its transfer office also in Scotland was wrongly paid and must

[1] *Ex parte* Horne, 1828.

[2] *Attorney-General* v. *Hope* (1834 C.M. & R. 530).

be paid in Scotland;[1] that shares in an English company with its head and transfer office in England are liable to probate duty although the owner thereof is a foreigner and the business is conducted in a foreign country;[2] that simple contract debts are liable if the debtor resides within this country; that securities passing on delivery or bonds payable to bearer are liable to this duty if found within the country;[3] that registered securities or stocks are taxable at the office of transfer; that shares in a business partnership are liable at the place where the business of the partnership is carried on and that specialty debts are taxable where conspicuous,[4] although they may, at times, be treated as simple contract debts. In general tangible property is located, for probate, where it actually lies at the time of the death of its owner and other forms of personal property where they can be effectually dealt with. A grant of an English Court does not operate beyond its jurisdiction[5] and, on the other hand, no English court will recognize a will of any person except such as has been adjudged by an English Court of Probate to be the last will and testament.[6]

The English legacy duty was imposed in 1758 and the succession duty act was enacted in 1853. These duties are imposed

[1] *Attorney-General* v. *Higgins*, (1856 H. & N. 339). But by the Confirmation and Probate Act of 1857 probate duty on all property liable in the United Kingdom could be paid at the time and place of the principal grant and this grant could be indorsed or sealed elsewhere by ancillary administration.

[2] *Attorney-General* v. *New York Breweries* (1889 A.C. 62). The court held that "probate duty is payable upon all assets of a deceased person whether domiciled in this country or not and includes choses of action incapable of being effectively transferred without some act being done in this country."

[3] *Stern* v. *Queen* (1896 1 Q.B. 211); *Winans* v. *Attorney-General* (1910 A.C. 62).

[4] *Commissioner of Stamps* v. *Hope* (1891 A.C. 476).

[5] *Blackwood* v. *Queen* (1882 A.C. 82). The court said: "The grant of probate does not of its own force carry the power of dealing with goods beyond the jurisdiction of the court that grants it though it may be the court of the testator's domicile. . . . . For the purpose of succession and enjoyment the law of the domicile governs the foreign assets; for the purpose of legal representation, collection, and administration as distinguished from distribution among successors . . . . the law of their own locality. . . . . It was not because the duty fell upon the residuary legatee that the English courts placed a limit upon probate duty acts. They thought the legislature could not intend to bring a tax on the grant of an instrument in respect to property which that instrument did not affect."

[6] *Attorney-General* v. *New York Breweries* (1899 A.C. 62). "The American will as regards the English assets has no validity and the American executor has no rights under it to English Assets."

upon the share of each beneficiary at a rate varying according to the amount of his share and the degree of the kinship existing between the testator and himself. Succession and legacy duties both rest "upon that moveable property and upon that moveable property only which the successor claims under and by virtue of British law."[1] Legacy duty attaches only to property attained under wills or intestacies, but succession duty applies to all gratuitous acquisitions at death except where legacy duty is chargeable.[2] The probate is a tax based upon the privilege of administration; the succession duty is the state's exaction for the privilege of succession which its laws confer. Since personal property devolves, in general, according to the law of the state in which the deceased owner has his domicile, the incidence of these taxes is often said to depend upon the domicile of the deceased.[3] But succession duty may be collected upon moveable property that has acquired a settlement or is held in trust by English trustees and therefore devolves under English law even if the deceased owner was domiciled abroad and the property is locally situate abroad.[4]

[1] Dicey, *Conflict of Laws*, p. 751. [2] Dymond, *Death Duties*, London, 1920.

[3] That the personal property of a decedent devolves, not according to the laws of the state where it is physically or actually located but according to the laws of the state of domicile of the deceased owner is a fact of great importance for these duties. A succession tax is not strictly a personal tax since it rests upon all real estate locally situate in the country. According to English jurists the maxim *mobilia sequuntur personam* is a fiction based upon "convenience," "to avoid the difficulty that would arise in exacting legacy and succession duties on any other principle" (*Winans* v. *Attorney-General* in 1910 A.C. 27), "difficulties hardly to be surmounted" (1865 *Wallace* v. *Allyn*) arising out of a "conflict of jurisdiction." It was to prevent such that "the law of the domicile was introduced and adopted by civilized nations." *Mobilia sequuntur personam* means that "for certain limited purposes we deal with *mobilia* (or leave them to be dealt with) under the law governing their owner as though they were situate in his country instead of ours and . . . . foreign countries do the like with regard to English moveables situated abroad. This principle or practice is considered just and expedient and our courts give it full effect in the construction of the taxing statutes."—Lord Robson (*Rex* v. *Lovitt* [1912 A.C.]).

[4] Compare Lovelace settlement (1858. 4 De G. & J. 340) Caligua settlement and *Montague* v. *Earl of Sandwich* (1Q.B. 1910). In the first case we have a marriage settlement where property is placed in trust under British law; in the second the property vested in trustees consists of foreign moveable property and in the last case mentioned the property was situate abroad, the testator died domiciled abroad but the property was held in trust by an English company, incorporated under English law, to be administered and its claims enforced by British law and was therefore liable to succession."—To be liable to succession duty a person must become "entitled by virtue of the laws of this country."—Lord Cranworth in 1862 (Enolin and Wylie 10 H.L.C.).

The estate duty, enacted in 1894, is paid by the administrator out of the corpus of the estate before distribution and therefore falls upon the residuary legatee. It is imposed upon all personal property locally situate in the United Kingdom, or, in other words, "upon all assets upon which probate duty is payable." It is also payable upon all movable property locally situate without the United Kingdom "if legacy or succession duty is payable thereon or would be so payable but for the relationship of the person to whom it passes."[1] Estate duty rests, therefore, upon all personal property locally situate within the country and upon all personal property succession to which is given by British law. The incidence of this tax combines the principle of independent *situs* with that of domicile, or the principle of probate with that of succession duty.

In Canada there is no federal taxation of inheritances, but each province has enacted a so-called succession duty statute. Bayley[2] has shown that the other provinces borrowed largely from the early act of Ontario and that this province in its earliest act followed, with modifications, legislation of the states of New York and Pennsylvania. But existing provincial legislation, while retaining features of these early acts, contains also many sections which have been taken unaltered or with modifications from the British Estates and Succession Acts. Moreover, Canada follows the British principles of jurisprudence and methods of legal procedure; the highest court of appeal for Canada is the British Privy Council, and its decision in any case is not merely final but becomes interpretative and authoritative for subsequent cases.

The construction or interpretation of provincial legislation is rendered difficult, however, not merely by the fact of its dissimilarity in many respects from British legislation but by reason of the constitutional restrictions placed upon provincial legislatures. A provincial legislature has[3] "control over property and civil rights" and has "power to impose direct taxation within the

[1] British Finance Act, 1894.

[2] Bayley, *Succession Duties in Canada.*

[3] British North America Act, 1867, 92; 2, 3.

province in order to the raising of a revenue for provincial purposes." This implies that inheritance as well as other taxation must be "direct taxation" and must rest upon something "within the province."

The legislature of Quebec was not permitted to put into operation a so-called license, but, in reality, stamp tax passed in 1875, because it was *indirect* taxation,[1] and a few years later, for the same reason, another act of this legislature, imposing a duty of ten cents upon each exhibit filed in court, was declared *ultra vires*.[2] In the latter case the court accepted Mill's definition of a direct tax as one "demanded from the very person who it is intended and desired shall pay it" as a basis of tax classification and asserted that "wherever the incidence of the tax was uncertain it should be regarded as indirect"—an inference which would make practically all taxation indirect.

But an act of Quebec,[3] taxing banks on their capital stock and insurance companies on the basis of their premium receipts was declared by the court to be direct taxation within the province. The industry was carrying on business within the province, notwithstanding its head office or domicile was elsewhere; and the tax was direct because it was imposed with the intention of exacting a contribution from the profits of productive business enterprises. A legal definition, said the court, must take into consideration "the general tendency of the tax," which in this case was direct, for if it were shifted at all it was by an "obscure and circuitous way."

An effort of Ontario[4] to collect from the administrator of an estate succession duties upon that portion which consisted of personal property locally situate in the United States was declared an indirect method of taxation designed to tax property

[1] (1875) 3 A.C. 1090. [2] 10 A.C. 141. [3] (1887) 12 A.C.

[4] *Woodruff and Others* v. *Attorney-General of Ontario* (1908 A.C.). This case is a special one; the property consisted of securities which passed to his children *inter vivos*, which were held in trust in New York by a New York trust company and their transfer was governed by the law of the state of New York. The Ontario Act as the court construed it placed the tax upon property situate in the province (not on the transmission of property), and in a later decision the Privy Council said of this case: "There was doubt as to the reasonings on which the decision was based."

which was situate without the province. Likewise Quebec[1] was not allowed to collect from the notary or administrator within the province succession duties on the portion of the estate locally situate in Boston. In this case the Privy Council held that a method of inheritance taxation which was designed to make one person pay duties with the expectation and intention that he would reimburse himself by collecting from others was indirect taxation and *ultra vires* of a provincial legislature.

The decision of Lord Moulton in the Cotton case brought something like consternation to provincial authorities. At first glance his condemnation seemed general enough to include the succession duties of other provinces. Quebec met the decision by passing three acts: one imposed a succession duty upon all property locally situated within the province (passing at death); another imposed a duty upon the transmission within the province of movable property locally situate without the province passing at the death of a person domiciled within the province, and a third act declared that the intent and meaning of the former legislation was that each beneficiary should pay the tax directly and without recourse.[2] As we shall see, these two succession acts just mentioned have been found to be valid legislation.

The ordinances of the province of Alberta[3] for administration of succession duties were declared *ultra vires* by Judge Beck

[1] *King* v. *Cotton* (45 S.C.R. 460) (1914 A.C. 176). Lord Moulton in this decision said: "Their Lordships can only construe these provisions as entitling the collector of inland revenue to collect the whole of the duties of the estate from the person making the declaration who may (and we understand in most cases will) be the notary before whom the will is executed, who must recover the amount so paid from the assets of the estate, or more accurately from the persons interested therein. . . . . Indeed, the whole structure of the scheme of these succession duties depends on the system of making one person pay duties which he is not intended to bear but to obtain from other persons. This is not in return for services rendered by the government as in the case where local probate has been necessary and fees have been charged in respect thereof." It is an instance of pure taxation and is "not direct taxation. . . . . The enactment is *ultra vires* on the part of the provincial government." In this case by the Quebec act the duty was placed upon the transmission but the court held that the words *situés dans la province* excluded application of the *mobilia sequuntur personam maxim.*

[2] 4 Geo. V. 1914. Acts of Quebec. [3] *Re Cust* (A.L.R. 39 and 308).

on the basis of the Cotton decision. Since the administrator must give bonds to pay the entire duty before probate was permitted, and since this was necessarily indirect taxation for property locally situate without the province, the court held it must be also regarded as such for property within the province. But the full court of the province reversed his decision. The Chief Justice held that the judgment in the Cotton case could not properly apply to Alberta where the law required (not the notary but) the legal administrator and, for the time being, the owner of the estate and personal representative of the beneficiaries, to pay the tax out of the property actually in his hands. So far as the ordinances applied to property in the province they were direct taxation.

Justice Clements,[1] of British Columbia, rendered a like decision with reference to the law of this province. In demanding payment of duty concurrently with the grant of probate he pointed out that the act was identical with that of New Brunswick, which the Privy Council had declared constitutional.[2] The real nature of a tax, he held, is in the *intended* incidence as disclosed by the statute. Just as a land tax enforced against land is not indirect taxation, so an inheritance tax on property need not be indirect because it is demanded of the administrator of the estate while it is in his hands. These decisions are in harmony with the expressed opinions of several Supreme Court judges. According to Judge Idington, a successor may escape provincial succession duties if he can obtain property locally situate without the province without asking recognition of provincial authorities or relying upon provincial law. But wherever a foreign court demands of a successor recognition by a province of his right to succession before allowing him to enjoy the property and wherever provincial legislation is so framed as to demand compliance with its taxing terms as a basis of such recognition succession duties can be collected and that by "very direct taxation." This distinguished jurist has also shown that the fathers of confederation, in speaking of direct and indirect

[1] 16 D.L.R. 4.

[2] *Lovitt* v. *Rex* (1912 A.C. 221).

taxes, were not using the terms in any scientific sense, but meant to reserve the customs duty for federal purposes and to permit provincial and local governments to make use of taxes on real estate, personal property, and incomes. Undoubtedly taxes on stocks-in-trade or on real estate may be far more indirect in their incidence than those rejected by the Privy Council.

Constitutional development is proceeding along lines of greater freedom for provincial legislatures in taxation. A direct tax may rest upon property, persons, or privileges. An administrator may be held responsible for the payment of succession duties upon that portion of the estate which is in his hands or comes to him for settlement and distribution, but he cannot be required to pay such taxes upon any portion of the estate over which he has not control. He must not take from the residuary legatee in order to pay taxes which otherwise the province could not collect; this would be indirect taxation and beyond the competence of a provincial legislature.

The restriction implied in the phrase "within the province" is a matter of controversy. Two of the present judges of the Canadian Supreme Court consider that it implies a real limitation of sovereignty; a limitation that differentiates a province not only from the imperial government but even from other colonies.[1] In his judgment in the Cotton case, Justice Anglin interpreted the decision of the Privy Council in the Woodruff case to prohibit a province from imposing succession duties on such personal property of domiciled decedents as was locally situate without the province and to limit a province to the direct taxation of property, person, or business actually situate within its territory.[2]

The phrase "within the province," he holds, is meant to preclude identical taxation of the same subject by more than one province and is a constitutional safeguard against all double

[1] Judge Anglin said (58 S.C.R. 570): "With great respect, however, his Lordship in applying the decision of *Harding* v. *Commissioner of Stamps for Queensland* would seem to have momentarily overlooked the fact that no restrictions of its powers of taxation similar to that imposed upon Canadian provincial legislatures (taxation within the province) applied to the Legislature of Queensland."

[2] Cotton case (45 S.C.R. 469) but in the recent case of *Smith Estate* v. *Provincial Treasurer of Nova Scotia* (58 S.C.R. 570), Justice Anglin accepts the position of the Chief Justice as given above.

taxation. Just as the words "direct taxation" delimit the sphere of provincial from federal jurisdiction so do the words "within the province" mark off the jurisdiction of one province from another. The Chief Justice accepts a similar view save that according to him the *situs* of property for provincial taxation must be determined by the law of England at the time of the passing of the act of confederation; or in other words a province must define the words "within the province" as meaning local *situs* of movable property for probate duty, but *situs* of such property on the basis of the domicile of the deceased owner for succession duty; no province may combine these two methods of determining *situs* in one tax act as was done by the British estate's duty, as this act was passed after the enactment of the British North America Act.[1]

But under this strict interpretation of the constitution only double taxation of *successions* and not double taxation of *inheritances* is prevented. For if a province should impose both a heavy probate or estate duty on the property locally within it and a succession duty upon all the personal property of its domiciled decedents, or if one province used one method and another the other means of taxation, there would still exist overlapping and unequal taxation. It would seem therefore that double taxation can only be avoided by wise and reciprocal legislation, and that justice must be sought by enlightened legislation[2]

[1] Chief Justice Davies said (58 S.C.R. 570): "The phrase 'within the province' must be determined by the rule so firmly established in Great Britain with respect to it at the time of the passing of the British North America Act as that embodied in the maxim *mobilia sequuntur personam* under which all the decedents' personal property wheresoever situate is brought within the province or country of his domicile and made liable for all succession or legacy duties there imposed upon it. . . . . Each province has the power of levying succession or legacy duties *only* upon the personal property passed by a domiciled decedent 'and any' other construction of the powers of taxation would create endless if not insuperable difficulties and would subject the same property to possible double liability to succession duty."

[2] "Any attempt on the part of the courts to ameliorate such incidental evils (double taxation) by way of needlessly limiting and cutting down the powers granted by the British North America Act to provincial legislatures only weakens the force that would otherwise be directed to enlighten the public opinion and to produce in the legislatures a proper consciousness of the unrighteousness of such methods."—Justice Idington (51 C.S.C.R. 430). "With the evils of double taxation the court has no power of interference. It is a matter for the consideration of the legislatures."—Justice Mignault (54 D.L.R. 89).

rather than through a rigid and somewhat autocratic interpretation of the constitution. Indeed, in view of existing powers of legislation it seems a little technical, formal, and superficial to insist upon the mere *form* of the taxing act as the essential feature in the situation.[1]

Since a provincial legislature may, by means of separate tax measures, impose one death duty upon personal property on the basis of actual *situs* and another at the domicile of the deceased owner, it is not unreasonable to suppose that both may be united in one piece of legislation and administered together.[2] In fact, this is exactly what most provincial acts purport to do; they are like the English estate duty in that they make use of the maxim *mobilia sequuntur personam* in taxing the succession to the personal property of their domiciled decedents wheresoever situate but at the same time limit or exclude the application of this maxim in respect to personal property locally situate within the province when owned by non-resident decedents. Moreover, these acts combine features of both succession and estate duties. They are duties upon successions in that the rate of the tax varies according to amount of each individual share and the kinship existing between testator and successor and in that the tax is imposed upon and taken out of the share of each beneficiary; but they are like estate duties in that the rate of taxation varies also according to the aggregate value of the entire estate, and in that the administrator must guarantee the payment of the tax as a condition of legal probate.[3]

[1] "The mere name seems to some persons to signify everything and hence while recognizing a probate law as valid they refuse to so recognize a tax resting on the same basis when called a succession or death duty. The British North America Act requires not only attention to the genesis and frame thereof and the growth of the law which it recognizes as existent but application of a wider vision and more comprehensive and accurate grasp of what is really dealt with than is evidenced in such distinctions."—Justice Idington (54 D.L.R.).

[2] "Toll may be taken as an incident in the accrual of the benefits or as a condition of the possessing of the title and since either may be validly acted upon to the exclusion of the other I do not see on what ground it can be said that both principles may not be brought, so to speak, under the same roof and combined in a single system."—Justice Duff in Cotton case (45 C.S.C.R. 469).

[3] In *Blackwood* v. *Queen* (8 A.C. 82) the Court said: "The statute under discussion does not make any such distinction as the English law has made between probate and legacy duties. . . . . The duty resembles our probate duty in being made a condition of the issue of probate and in being taken from the estate while

The position held by such jurists as Duff and Idington of the Canadian Supreme Court is that the phrase "within the province" is merely declaratory; that a province has as much power of legislation in the sphere in question as it had prior to confederation,[1] or as any other colony possesses; that its power is full and plenary within its area of jurisdiction; and that the control of property and civil rights and the imposition of direct taxation are matters entirely within its jurisdiction.[2]

The right of a province to tax property locally situate within its territory cannot be questioned; it has been thoroughly established by the courts. The decision of the Privy Council in the Lovitt case[3] is an example, although Lord Robson pointed out the similarity of the New Brunswick tax to an estate or probate duty. Yet the rate of the tax in this case did vary according to the relationship between the successor and the deceased and the tax paid by the administrator came out of the shares of each beneficiary or, what is often the same thing, out of the share of each group of beneficiaries. Moreover, the whole argument of the

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it is yet in bulk. . . . . In other respects, notably by reason of its incidence on real estate, and of its being charged against every legatee and of the difference of its rate according to the relation of the successor to the deceased it more resembles our legacy and succession duties. . . . . There are decisions of the construction of English statutes with reference to English methods of taxation which are of great value if it were first found that the Victorian legislature had adopted any such method but which are of little use until that conclusion has been reached."

[1] In 1892 A.C. 436 (*Liquidators of Maritime Bank* v. *Receiver-General of New Brunswick*) Lord Watson said: "So far as relates to matters which by section 92 are specially reserved for provincial legislatures the legislature of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the act."

[2] In *Lovitt* v. *Rex*, Lord Robson speaking for the court argued that the Privy Council in a previous decision had declared that the colony of Queensland could by clear and apt language so limit the application of the maxim *mobilia sequuntur personam* as to tax personal property locally situate in its territory although the deceased owner was a foreign resident; that the province of New Brunswick had by express language so limited this maxim and therefore had imposed a death duty on the personal property of non-residents passing at death. It is here assumed that New Brunswick has the same power as Queensland.

[3] In the Lovitt case the court admits the ungenerous character of the legislation and the probability of double taxation since the province of Nova Scotia will also tax the same property. But "these are considerations for the New Brunswick legislature rather than for the law courts, and although the courts *will not easily adopt a construction leading to such results, yet, if the language of the statute is explicit, effect must be given to it.*"

court is against the contention that the mere form of the tax gives the right to its imposition. Lord Robson thought it absurd to say that a province may tax money left by a non-resident in a bank but that it must not call such taxation a succession duty or impose it at the passing at death or at rates that vary according to the relation of successor to the deceased. He distinctly stated that a "colonial legislature may if so minded impose a succession duty on property within the province though such property devolved under the law of another domicile."

At the present moment succession duties are being exacted in practically every province upon personal property locally situate therein without regard to the domicile of the deceased owner, and upon some shares the rate reaches as high as 30 per cent. Most provinces have framed their acts with the primary object of taxing according to local or actual *situs* and most of the important decisions of Canadian courts on succession duty are concerned with the determination of the local *situs* of property.[1]

Not only does a province exact death duties upon the passing of all personal property locally situate within its area but it bases its rate of such taxation upon the total value of the estate so passing including property both within and without the province.[2]

That a provincial legislature has also the power under properly framed legislation to exact a succession duty upon the passing at death of all the personal property of its domiciled decedents there would seem, in view of recent decisions, to be no question. The right to tax the passing of all the movable property of the domiciled decedents of a state by a succession duty does not rest upon any extra-territorial rights of sovereignty of such state but upon the universal recognition of the devolution of such property according to the maxim *mobilia sequuntur per-*

[1] According to decisions of Canadian courts succession duty may be imposed by a province upon money left in the bank by a foreign citizen, upon stocks or bonds at the office of legal registration and transfer, upon specialities where conspicuous at time of death, upon lands held in partnership in province where the lands are situate, etc.

[2] *Royal Trust Company* v. *Minister of Finance for British Columbia* (56 D.L.R.). The court held that "the scale by which succession duties are to be measured and the conditions upon and by which it is to be applied are clearly within the powers of the provincial legislature to enact."

sonam[1] and of the right of a state to tax the passing of property that devolves under its laws. The right, therefore, belongs to a province as fully as to any other state since provincial law grants the right to the succession and enjoyment of property passing on the death of its domiciled inhabitants. Moreover, a province, while limited to direct taxation within its area, is not limited to the direct taxation of property; it may tax, as well, persons or privileges including the great privilege to succeed to, and enjoy the use of, property by virtue of provincial law. The province has control over property and civil rights and the right to tax is "but the right to define to whom the property of a person domiciled in this country shall pass at death."[2]

That a provincial legislature may impose succession duty upon all the personal property of its domiciled decedents passing at death, including the property locally situate without its own territory, has been established by two recent decisions of the Supreme Court of Canada. In one case shares held by a domiciled decedent of Nova Scotia in the Royal Bank of Canada were held liable to the succession duty of the province of domicile (not that they had an actual *situs* within the province because the office of legal transfer was in the city of Halifax, as was affirmed by the Supreme Court of Nova Scotia but because a province had the right to tax the passing of the personal property of its own domiciled decedents).[3]

Again, a recent decision affirms by a *unanimous* judgment[4] that the act passed by the legislature of Quebec imposing

[1] That there is this universal recognition carrying with it the right to tax the succession by the state of domicile is admitted. It may be that the maxim *mobilia sequuntur personam* is a legal fiction, that the state of actual *situs* consents to or permits the law of the state of domicile to determine the succession to property actually within its own territory, and thereby makes that law, as it were, its own law; but in so doing it does not waive its prior right to assert its own law of succession should necessity demand or to exercise its control over property within its area to the extent of imposing a tax upon it on its passing at death to another owner.

[2] Justice Idington in *Barthe* v. *Alleyn Sharples* (54 D.L.R. 89).

[3] *Smith Estate* v. *Provincial Treasurer of Nova Scotia*, (58 S.C.R. 570). Majority of Supreme Court agreed that local *situs* was at transfer office at Halifax rather than at head office in Montreal but gave decision on basis of domicile of owner.

[4] *Barthe* v. *Alleyn Sharples*. (54 D.L.R. 89. 1920). Shares in question had an actual *situs* outside the province but were held liable to duty solely on the principle of domicile and the validity of the act of Quebec taxing transmissions governed by the laws of the province.

succession duty upon transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate without the province at the time of death, was *intra vires* and within the competence of the legislature. This reversed the decision of the Supreme Court of Quebec in the same case which had held

that the powers of the provincial legislature are not plenary but limited to direct taxation within the province and that any attempt to levy a tax on property locally situate outside the province is not taxation within the province and is beyond the competence of the provincial legislature; that a tax on transmission within the province of property locally situate outside the province is an attempt to do indirectly that which the legislature is forbidden to do directly and is in effect taxation upon property without the province and the shares in question in this case are locally situate without the province and have a *situs* without the province.

The one cause of double taxation of successions in Canada arises out of the conflict of *situs* as fixed by the actual location of the property and as determined by the domicile of the deceased owner. A similar conflict exists in the provincial taxation of companies and will become more general as provincial income taxes are adopted. It may be said that our courts have permitted this extent of double taxation with extreme reluctance but in view of the decisions just quoted such double taxation may become more general. If each province would confine its taxation of successions to the principle of domicile there would not be double taxation, since in Canada a person can have but one domicile and a court of last resort must fix that domicile. Nor would there be double taxation (to any extent at least) if each province taxed only on the basis of actual *situs* since according to a recent decision of the Privy Council a property cannot have more than one *situs*.[1]

A recent decision of the Supreme Court of Nova Scotia dealing with a conflict of actual *situs* of property rests upon the fact that there is but one *situs* for property. The province claimed succession duty upon 5,000 shares in the Nova Scotia

[1] *Toronto Trust Company* v. *The King* (A.C. 1919). The province was authorized to collect duty upon the death of a mortgagee domiciled outside of the province upon mortgages registered under the Alberta Land Title Act and the duplicate retained by the register was declared to be the real security. The mortgage was a specialty debt but since it was conspicuous in two places other factors must be considered in order to fix its real *situs*.

Steel Company, bought by a foreign citizen from a corporation in his own state and transferred to him by another corporation in his state, which was a legal transfer office of the Nova Scotia Steel Company. The shares in question at the death of this foreigner passed to trustees of a foreign state and the income therefrom was to be paid to the daughter of the deceased, also a domiciled resident of a foreign state. The province of Nova Scotia claimed the duty on the ground that the Steel Company was incorporated by its laws and that the provincial Companies' Act required each company incorporated by the province to keep its principal register of all stocks and debentures within the province and declared that an office of registration without the province must be subsidiary thereto.

The court held that the shares were located at the registration office in the state of New York where they could be effectually dealt with and were not "property situate in Nova Scotia."[1]

There is no such double or multiple taxation of inheritances in Canada as exists among states of the Union.[2] For the double taxation which does exist, a partial and often quite satisfactory remedy is provided in the reciprocity feature of provincial acts, and in the methods of administration adopted by the proper authorities. In most provinces, as has been indicated, the main effort is directed toward the taxation of property on the basis of actual *situs* and several provinces proceeding consistently on this principle credit their own citizens with payments of succession duty to another province or state where personal property

[1] In the DeLamer case (N.S.R. 1921), the Chief Justice said: "The Government cannot by giving notice forbidding the transfer in New York and bringing the parties before the court here change the *situs* of the property. The legislature cannot by calling the New York register a subsidiary register alter the fact that the register is in New York and that the shares can be effectually dealt with there without coming into this province or doing any act here."

[2] According to the report of the Committee on Inheritance Taxation of the National Tax Association in 1921 multiple taxation among states of the Union arises (*a*) where securities owned by a non-resident represent interest in a corporation incorporated in the state; (*b*) where there is transfer of securities of foreign corporations owned by non-residents and the corporations have property in the state; (*c*) where there is transfer of securities of a foreign corporation owned by non-residents having no property but a transfer office in the state; (*d*) on transfers where corporations are incorporated in more than one state; (*e*) on the transfer of intangibles where these are kept within the state; (*f*) where there is duplication of domicile.

is locally situate.[1] Unfortunately, there are other provinces that have far less generous reciprocity clauses in their acts and pursue a narrow policy of administration. The one aim seems to be to secure revenue, without regard to just treatment of citizens, especially citizens of other provinces or states and a few of these provinces even impose higher rates upon non-resident successions. It does not require great courage to tax the citizens of another state, but it should not demand great foresight to recognize that this practice is as economically unwise as it is morally indefensible.

It is doubtful if the adoption of inheritance taxation on the basis of the actual *situs* of personal property (for this is what an extension of the reciprocity treatment amounts to) will afford a satisfactory solution of the conflict of provincial jurisdiction and double taxation therefrom. Provinces, with wealthy citizens, which have adopted the British practice of taxation at the *situs* of domicile, will not easily adopt the other method. An estate duty is of the nature of a tax upon *property* and should perhaps be imposed where it is locally situate, but a succession duty is more akin to a *personal* tax, based upon ability to pay, and the state of domicile of the deceased owner has a strong claim to such taxation. There seems to be almost as much justice for the contention that inheritance taxes should be divided between the state of actual *situs* of property and that of domicile of its decedent owner as there is for the division of the proceeds of income taxation on the same basis.[2] There is also

[1] The Deputy Provincial Treasurer of Manitoba states: "In practice any property of a deceased person domiciled in Manitoba, is allowed to pass so far as we are concerned if we have evidence that a successor has paid duty thereon in another province of state; we only wish to collect duty from residents of the province if they do not properly have to pay duty elsewhere." So also the Deputy Attorney-General of Novia Scotia: "Property of a person domiciled in Nova Scotia actually brought into this province for administration is not taxable here, if a tax has been imposed on it in the place where it was actually situate at the time of death, unless such tax was less than our tax and then we impose merely the difference between the taxes."

[2] The Report of the Committee on State and Local Taxation submitted to the National Tax Association in 1920, which has won such general approval proposes two income taxes: one as a business tax upon incomes at the place where the business is carried on and the other as a personal tax based upon ability to pay to be exacted of each person at his place of domicile.

the further consideration that only such a solution will stand a chance of general acceptance.

A provincial succession duty in reality imposes two taxes: one is akin to an estate duty since its rate is graduated according to the aggregate value of the estate; the other is a genuine succession duty imposed upon each beneficiary at a rate graduated according to his kinship to the deceased and progressing according to the amount of his share. These taxes are now imposed under one section of the act and are calculated together but they could easily be separated and placed in different statutes. One act would then impose an estate duty upon all property locally situate within a province, and the other a succession duty upon all successions devolving according to provincial law. Such a solution would also permit the adoption of a flat rate of taxation upon the gross value of the personal property of non-residents, as recommended by Mr. Matthews.[1] There is not, however, the same argument for the adoption of this form of taxation in Canadian provinces that he has made for its use among the individual states of the Union. Double taxation does not exist among provinces to the extent it prevails among different states, and consequently the requirements of provincial tax authorities do not give to the administrators of provincial estates the trouble, expense, or inconvenience experienced by executors or administrators in the United States. Moreover, in the provinces personal property of the non-residents is taxed on its *net* value at exactly the same rate and in the same manner as the property of domiciled decedents. Wherever such property is within the area of a province the tax authorities require from the administrators of the estate a statement showing the aggregate value of the total

[1] *The Flat Rate Plan for the Taxation of Personal Property of Non-Residents Passing at Death*, National Tax Association 1921. In this able paper, Mr. Matthews states that according to state court decisions a succession tax upon the personal property of non-residents, no matter how imposed, is treated by the administrator of the estate in the state of domicile not as an "inheritance" tax at all but as an expense of administration to be deducted from the corpus of the estate before distribution, and therefore to come out of the residuary legatee. "To hold that the effect of the foreign law is to reduce the legacy given by the will, construed in accordance with the law of the testator's domicile, is to permit the foreign law to regulate the testamentary capacity of a citizen of this state. But the foreign law cannot extend beyond the jurisdiction which created it."

estate both within and without the province and of the debts or other amounts that may be deducted from the gross value in order to ascertain the dutiable value of the estate. The provincial tax officals calculate the succession duty which the province would exact if the whole estate were within its jurisdiction and charge such a percentage of this tax as the portion of the estate within the province bears to the entire estate wheresoever situate. In this manner the property within the province gets its proper reduction for debts and the rate of taxation upon each share is exactly what it would be if the entire property were within the province.

Again, the tax so imposed upon non-resident property is not treated by the administrator of the estate in another province as an expense of administration to come out of the share of the residuary legatee; but it is deducted from the shares upon which it is imposed by governments that according to the Supreme Court of Canada have the power so to exact it. Indeed, quite often in accordance with the reciprocity feature the province of domicile permits its own tax upon such property to be offset by the tax paid in the province of actual *situs* up to the full amount of its own tax, and since succession duty is imposed in much the same manner and at about the same rates in the different provinces the application of this feature makes the taxation upon each share about the same as if the property in question were situate in the province of domicile.

It is clear that a provincial legislature may tax on its passing at death all personal property locally within its area and that it may fix the rate of taxation according to the total value of the estate or the total share of the beneficiary wheresoever situate. There would seem therefore to be no serious objection to the imposition of an estate tax graduated according to the aggregate dutiable value of the estate. Either such a division of present taxation of inheritances between provinces or else a thoroughgoing adoption of the reciprocity feature would seem to be the solution of double taxation resulting from the succession duty legislation of the different Canadian provinces.

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